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MOHD TOUFIC OZEIR

v.

DESA HATCHERY SDN BHD

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COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
LIM YEE LAN JCA
MOHD ZAWAWI SALLEH JCA
[CIVIL APPEAL NO: W-03(IM)-98-02-2013]

C

16 JUNE 2014

BANKRUPTCY: *Notice - Setting aside - Proceedings - Failure of Deputy Registrar to accord parties right to be heard - Whether fundamental breach of rules of natural justice - Decision to set aside*

D

bankruptcy notice without hearing merits of application - Whether serious miscarriage of justice - Judgment creditor had earlier made decision not to proceed with bankruptcy proceedings - Conduct of judgment creditor in initiating fresh bankruptcy proceedings - Whether amounted to abuse of process of court

E

BANKRUPTCY: *Proceedings - Bankruptcy notice - Application to set aside bankruptcy notice - Failure of Deputy Registrar to accord parties right to be heard - Whether fundamental breach of rules of natural justice - Decision to set aside bankruptcy notice without hearing merits of*

F

application - Whether serious miscarriage of justice - Judgment creditor had earlier made decision not to proceed with bankruptcy proceedings - Conduct of judgment creditor in initiating fresh bankruptcy proceedings - Whether amounted to abuse of process of court

The judgment creditor/respondent ('JC') had entered into a

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contract with a company, Kokomewah Sdn Bhd (the principal debtor) for the construction of a hatchery. The judgment debtor/ appellant ('JD') had stood as a guarantor for the contract, which was subsequently terminated. The JC then filed a suit against the JD in the High Court and summary judgment was entered by the

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Deputy Registrar of the High Court against the JD. The JD filed an appeal to the judge in chambers, which was dismissed. Thereafter, the JC, premised on the judgment dated 28 August 2006, took out a bankruptcy notice against the JD ('the first bankruptcy proceedings'). The JD's application to set aside the

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bankruptcy notice was unsuccessful. Subsequently, on the advice of the Permanent Secretary of the Ministry of Finance of Sabah, the JC decided not to proceed with the bankruptcy proceedings.

However, some three and a half years later, a fresh bankruptcy notice ('the second bankruptcy notice') was taken out by the JC against the JD. The JD then filed a summons in chambers (encl. 4) to set aside the second bankruptcy notice pursuant to rr. 18 and 276 of the Bankruptcy Rules 1969 and/or O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980. The JC raised a preliminary objection against the JD's application to set aside the second bankruptcy notice, contending that the application by the JD was flawed. On 24 October 2012, the Deputy Registrar not only decided on the preliminary objection but proceeded to dismiss encl. 4. The JD filed an appeal to the judge in chambers (encl. 16) against the decision of the Deputy Registrar in dismissing the application to set aside the second bankruptcy notice. The High Court Judge dismissed the JD's appeal against the decision of the Deputy Registrar. Hence, this appeal. The JD raised two main grounds for appeal (i) that the decision of the Deputy Registrar was seriously flawed by reason of a breach of the rules of natural justice for failing to hear the application on merits before making a decision and that the High Court Judge should have addressed and ruled on this issue instead of glossing over it; and (ii) that the second bankruptcy notice filed by the JC amounted to an abuse of process of the court since the JC had earlier made a decision not to proceed with the first bankruptcy proceedings.

Held (allowing appeal with costs):
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) The failure on the part of the Deputy Registrar to accord parties the right to be heard before him amounted to a fundamental breach of rules of natural justice. The hearing of the application to set aside the second bankruptcy notice before the Deputy Registrar was procedurally flawed as the Deputy Registrar should have allowed the JD to submit orally, despite the fact that the parties had filed their written submissions. Without hearing arguments by either party, the Deputy Registrar proceeded to deliver his decision on the application to set aside the second bankruptcy notice. The Deputy Registrar's action thus amounted to a gross procedural impropriety and a blatant disregard of the rules. It is the rule of law that parties in a court proceeding have the right to be heard before a deliberation is made. (paras 27 & 28)

(2) Since the Deputy Registrar had reserved 24 October 2012 for decision on the preliminary issue only, the Deputy Registrar should have confined his decision on the preliminary issue only. In deciding on the application to set aside the second bankruptcy notice without hearing the merits of the application, the Deputy Registrar had committed a serious miscarriage of justice (*Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors and Another Application*, refd). To deny the parties the right to argue before the Deputy Registrar would in essence mean that the parties would be deprived of one level of hearing before the court. Such a practice was procedurally flawed and could not be condoned by this court. (paras 29 & 31)

(3) The High Court Judge erred in law in ignoring the complaint of the JD that the parties before the Deputy Registrar was denied the right to make oral submissions on the merits of the setting aside application. The High Court Judge should have entertained the complaint, and should have ordered that the matter be sent back to the Deputy Registrar for oral submission on the merits. Since the matter began at the Deputy Registrar's level, the JD was entitled to a full and proper hearing before the Deputy Registrar. Such a right should not have been denied. (para 32)

(4) The conduct of the JC in not proceeding with the bankruptcy matter against the JD in compliance with the instruction from the Permanent Secretary was a clear indication by the JC that it had put a finality to the bankruptcy proceedings against the JD. The JD was now entitled to conduct his personal affairs accordingly, without having to worry of the threat of the bankruptcy proceedings. The conduct of the JC in initiating fresh bankruptcy proceedings against the JD based on the very same judgment of 28 August 2006, some three and a half years later, amounted to an abuse of process of the court. (paras 36 & 37)

Bahasa Malaysia *Translation Of Headnotes*

Pemiutang penghakiman/responden ('JC') telah memasuki satu kontrak dengan sebuah syarikat, Kokomewah Sdn Bhd (penghutang utama) untuk pembangunan satu tempat penetasan. Penghutang penghakiman/perayu ('JD') telah bertindak sebagai penjamin bagi kontrak tersebut, yang kemudiannya telah dibatalkan. JC kemudiannya memfailkan guaman terhadap JD di

Mahkamah Tinggi dan penghakiman terus telah dimasukkan oleh Timbalan Pendaftar Mahkamah Tinggi terhadap JD. JD memfailkan rayuan kepada hakim dalam kamar, yang telah ditolak. Berikutnya, berdasarkan penghakiman bertarikh 28 Ogos 2006 itu, JC mengeluarkan notis kebankrapan terhadap JD (prosiding kebankrapan pertama). Permohonan JD untuk mengenepikan notis kebankrapan tidak berjaya. Kemudiannya, atas nasihat Setiausaha Tetap Kementerian Kewangan Sabah, JC memutuskan untuk tidak meneruskan prosiding kebankrapan. Walau bagaimanapun, tiga setengah tahun kemudian, notis kebankrapan baru (notis kebankrapan kedua) telah dikeluarkan oleh JC terhadap JD. JD kemudiannya memfailkan saman dalam kamar (lampiran 4) untuk mengenepikan notis kebankrapan kedua menurut kk. 18 dan 276 Kaedah-Kaedah Kebankrapan 1969 dan/atau A. 18 k. 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980. JC membangkitkan bantahan awalan terhadap permohonan JD untuk mengenepikan notis kebankrapan kedua, dengan hujahan bahawa permohonan JD adalah cacat. Pada 24 Oktober 2012, Timbalan Pendaftar tidak hanya memutuskan atas bantahan awalan tetapi telah juga menolak lampiran 4. JD telah memfailkan rayuan kepada hakim dalam kamar (lampiran 16) terhadap keputusan Timbalan Pendaftar menolak permohonan pengenepian notis kebankrapan kedua. Hakim Mahkamah Tinggi telah menolak rayuan JD terhadap keputusan Timbalan Pendaftar. Oleh itu, rayuan ini. JD telah membangkitkan dua alasan utama bagi rayuan ini (i) bahawa keputusan Timbalan Pendaftar adalah cacat kerana ia telah melanggar peraturan keadilan asasi atas kegagalan mendengar merit permohonan sebelum membuat keputusan dan bahawa Hakim Mahkamah Tinggi sepatutnya telah menangani dan memutuskan atas isu ini dan bukan hanya melihatnya secara ringkas; dan (ii) bahawa notis kebankrapan kedua yang difailkan oleh JC merupakan satu penyalahgunaan proses mahkamah kerana JC telah sebelum ini memutuskan untuk tidak meneruskan dengan prosiding kebankrapan yang pertama.

Diputuskan (membenarkan rayuan dengan kos):
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Kegagalan Timbalan Pendaftar memberikan kepada pihak-pihak hak untuk didengar terjumlah kepada pelanggaran asas keadilan asasi. Perbicaraan permohonan mengenepikan notis kebankrapan kedua di hadapan Timbalan Pendaftar adalah cacat secara prosedur kerana Timbalan Pendaftar seharusnya membenarkan

JD untuk mengemukakan hujahan secara lisan, walaupun pada hakikatnya pihak-pihak telah memfailkan penghujahan bertulis mereka. Tanpa mendengar hujah-hujah oleh pihak-pihak yang terlibat, Timbalan Pendaftar telah meneruskan untuk memberikan keputusannya berkenaan permohonan pengenepian notis kebankrapan kedua. Tindakan Timbalan Pendaftar dengan itu terjumlah kepada ketidakwajaran prosedur dan secara terang-terangan mengabaikan peraturan-peraturan. Adalah menjadi kaedah undang-undang bahawa pihak-pihak dalam prosiding mahkamah mempunyai hak untuk didengar sebelum keputusan dibuat.

(2) Oleh kerana Timbalan Pendaftar telah memilih tarikh 24 Oktober 2012 untuk keputusan bagi isu bantahan awalan, Timbalan Pendaftar seharusnya mengehadkan keputusannya kepada isu bantahan awalan sahaja. Dalam memutuskan permohonan untuk mengenepikan notis kebankrapan kedua tanpa mendengar merit permohonan, Timbalan Pendaftar telah melakukan salah laksana keadilan yang serius (*Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors and Another Application*, dirujuk). Untuk menafikan hak memberi hujahan di hadapan Timbalan Pendaftar akan pada dasarnya bermakna pihak-pihak akan kehilangan satu peringkat perbicaraan di hadapan mahkamah. Amalan seperti itu adalah menjejaskan prosedur dan tidak boleh dibenarkan oleh mahkamah ini.

(3) Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang apabila mengabaikan aduan daripada JD bahawa pihak-pihak di hadapan Timbalan Pendaftar telah dinafikan hak untuk membuat hujahan secara lisan atas merit permohonan pengenepian itu. Hakim Mahkamah Tinggi seharusnya melayan aduan itu, dan sepatutnya memerintahkan supaya hal perkara tersebut dihantar semula kepada Timbalan Pendaftar untuk hujahan secara lisan atas merit. Oleh kerana hal perkara telah bermula di peringkat Timbalan Pendaftar, JD berhak mendapat perbicaraan penuh dan tepat. Hak seperti itu tidak sepatutnya dinafikan.

(4) Tindakan JC dalam tidak meneruskan hal perkara kebankrapan terhadap JD dengan mematuhi arahan daripada Setiausaha Tetap adalah petunjuk jelas oleh JC bahawa JC telah mengakhiri prosiding kebankrapan terhadap JD. JD kini berhak untuk mengendalikan urusan peribadinya dengan sewajarnya,

tanpa perlu bimbang mengenai ugutan prosiding kebankrapan. Tindakan JC dalam memulakan prosiding kebankrapan yang baru terhadap JD berdasarkan penghakiman yang sama 28 Ogos 2006, iaitu tiga setengah tahun kemudiannya, terjumlah kepada penyalahgunaan proses mahkamah.

Case(s) referred to:
Bradford & Bingley Building Society v. Seddon [1999] 1 WLR 1482 ***(refd)***
Hunter v. Chief Constable of the West Midlands Police [1982] AC 529 ***(refd)***
Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors and Another Application [2010] 3 CLJ 895 FC ***(refd)***

Legislation referred to:
Bankruptcy Rules 1969, O. 18, O. 95, O. 276
Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)

For the appellant/judgment debtor - Gopal Sri Ram (Lua Ai Siew & Saraswathy Shirke Devi with him); M/s Soo Thien Ming & Nashrah
For the respondent/judgment creditor - Ringo Low; M/s Ringo Low & Assocs

[Appeal from High Court, Kuala Lumpur; Bankruptcy No: 29-2691-05-2012]

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] The appeal before us emanates from the High Court of Kuala Lumpur, namely, Kuala Lumpur High Court Bankruptcy No. 29-2691-05-2012.

[2] The appeal is by the judgment debtor against the decision of the learned High Court Judge on 4 February 2013 dismissing the judgment debtor's appeal to the judge in chambers (encl. 16) against the decision of the learned Deputy Registrar. Previously, on 24 October 2012 the Deputy Registrar had dismissed the judgment debtor's summons in chambers (encl. 4) to set aside the bankruptcy notice dated 15 May 2012 issued against him.

[3] On 14 February 2014 we allowed the judgment debtor's appeal with costs and set aside the decision of the High Court.

[4] Our decision is unanimous.

[5] We shall now give our grounds for allowing the appeal.

[6] We begin by setting out briefly the facts of the case.

[7] The judgment creditor (the respondent in the present appeal) is a company wholly owned by the State Government of Sabah by virtue of the fact that its shareholders comprise of a company called Desa Lestari Sdn Bhd and the State Government of Sabah. Desa Lestari Sdn Bhd, in turn, is wholly owned by the State Government of Sabah. Sometime in 1984, the judgment creditor had entered into a contract with a company known as Kokomewah Sdn Bhd (the principal debtor) for the construction of a hatchery. The judgment debtor and one Hadijah bt Harris stood as guarantors for the contract pursuant to two letters of guarantee dated 23 June 1984 and 4 April 1985, respectively. However, the contract was terminated in 1985.

[8] The judgment creditor then filed a suit in the High Court of Kota Kinabalu *vide* Kota Kinabalu Civil Suit No. K-1122-1985 against the judgment debtor and Hadijah bt Harris, the co-guarantor. On 29 July 1998 summary judgment was entered by the Deputy Registrar of the High Court of Kota Kinabalu against the judgment debtor for the sum of RM3,700,000. The action was not pursued against the co-guarantor. The judgment debtor filed an appeal to the judge in chambers whereby the appeal was dismissed by the learned judge but the judgment sum was varied and reduced to RM2,072,046.11 on 28 August 2006.

[9] Thereafter, the judgment creditor, premised on the judgment dated 28 August 2006, took out a bankruptcy notice dated 5 December 2007 against the judgment debtor *vide* Kuala Lumpur High Court Bankruptcy No. D7-29-3484-2007 (hereinafter referred to as 'the first bankruptcy proceedings'). The judgment debtor applied to set aside the bankruptcy notice but was unsuccessful as the application was dismissed by the Deputy Registrar on 26 September 2008; and the appeal to the judge in chambers was similarly dismissed on 5 November 2009.

[10] On 10 November 2008, the Permanent Secretary of the Ministry of Finance of Sabah wrote to the judgment creditor directing the judgment creditor not to proceed with the ongoing bankruptcy proceedings against the judgment debtor. The said letter from the Permanent Secretary is reproduced below:

Faks: 237605
Tel: 088-252692
Bil: KEW(S):100-0/2/61/1(9)
Tarikh: 10 November 2008

KEMENTERIAN KEWANGAN
Wisma Kewangan
88593 Kota Kinabalu
Sabah, Malaysia

Puan Angeline Soh,

Acting Chief Executive Officer,
Desa Hatchery Sdn Bhd,
Level 3, West Wing,
Wisma 2020, 18 Lorong Bella,
Karamunsing,
88100 KOTA KINABALU.

Bankruptcy Proceedings Against Dato' Seri Mohamad Toufic Al-ozeir

Your letter ref: COR.ACEO/10(2) dated 10th November, 2008 and our telephone conversation on the 07th November, 2008 pertaining to the above refers.

2. I have taken into consideration the intention of Desa Hatchery Sdn Bhd of having to pursue with the bankruptcy proceedings against Dato' Seri Mohamad Toufic Al-Ozeir but regret to inform you that please do not proceed with the petition. This decision was made after taking into consideration of the implications it may have on our organization overall.

Thank you.

"BERKHIDMAT UNTUK NEGARA"

"JIMAT DAN PRODUKTIF"

-signed-

(Yusoff bin Datuk Hj. Mohd. Kassim, PGDK)
Permanent Secretary

[11] Pursuant thereto, the judgment creditor *vide* letter dated 11 November 2008, and addressed to its then solicitors, Messrs Ubing & Co, conveyed the message of the Permanent Secretary of the Ministry of Finance. The letter dated 11 November 2008 is reproduced below:

A Desa Group of Companies

Ref: COR.ACEO/10(4) BY FAX/HAND
Date: 11th November 2008 (088) 488959

B Chiam Ubing & Co.,
Unit F3, 17A, 3rd Floor,
Kompleks Asia City,
Jalan Asia City,
88000 Kota Kinabalu, Sabah.
(Attention: Mr. Ken Chiam)

C

Dear Sir,

Re: Petition Of Bankrutcy Proceedings Against Dato' Sri Mohamad Toufic Al-Ozeir

D Further to our letter ref. COR.ACEO/10 dated 7th November 2008 pertaining to the above subject matter, we extend herewith a copy of the instructions from Datuk Hj. Yusoff bin Datuk Hj. Mohd. Kassim, Permanent Secretary of Ministry of Finance informing Desa Hatchery Sdn Bhd not to proceed with the
E petition of bankruptcy proceedings against Dato' Sri Mohamad Toufic Al-Ozeir for your file.

Kindly acknowledge receipt of this letter and the enclosure.

Thank you.

F Yours faithfully,

For DESA HATCHERY SDN BHD

-signed-

G (ANGELINE SOH)
Acting Chief Executive Officer Cum
Senior General Manager (Finance/Operations)

[12] The decision not to proceed with the bankruptcy proceeding
H by both the State Government of Sabah and the judgment creditor was within the knowledge of the judgment debtor; and the judgment creditor knew of the judgment debtor's knowledge.

[13] Thus, no further action was taken by the judgment creditor thereafter on the bankruptcy proceedings against the judgment
I debtor.

[14] However, subsequently, some three and a half years later, a fresh bankruptcy notice dated 15 May 2012 (hereinafter referred to as 'the second bankruptcy notice') was taken out by the judgment creditor against the judgment debtor. The second bankruptcy notice was again based on the judgment of 28 August 2006.

[15] The judgment debtor then filed a summons in chambers (encl. 4) to set aside the second bankruptcy notice pursuant to O. 18 and O. 276 of the Bankruptcy Rules 1969 and/or O. 18 r. 19(1)(b) and (d) Rules of the High Court 1980. The judgment creditor raised a preliminary objection against the judgment debtor's application to set aside the second bankruptcy notice, contending that the application by the judgment debtor was flawed as the application should have been made under O. 95 of the Bankruptcy Rules 1969 instead of under O. 18 of the same.

[16] On 15 October 2012 the learned Deputy Registrar heard oral submissions from both parties on the preliminary objection raised by the judgment creditor, and reserved his judgment to 24 October 2012. However, on 24 October 2012, much to the surprise of the parties, the learned Deputy Registrar not only decided on the preliminary objection, but proceeded to dismiss the judgment debtor's application to set aside the second bankruptcy notice (encl. 4) without hearing it on merits.

[17] The judgment debtor filed an appeal to the judge in chambers against the decision of the learned Deputy Registrar in dismissing the application to set aside the second bankruptcy notice. The appeal was dismissed by the learned judge on 4 February 2013.

[18] Before the learned High Court Judge, the learned counsel for the judgment debtor, in her submission complained about the failure on the part of the Deputy Registrar to hear submissions from parties on the merits of the setting aside application. That this complaint was made is acknowledged by the learned High Court Judge; for she said in her judgment (at p. 220 of the supplementary appeal record):

The Appellant's Argument

The Registrar erred in law and in fact in the adjudication of the application to set aside (Enclosure 4) as he was scheduled to deliver his decision only on a Preliminary Objection (PO) raised. The JD's Counsel did not address him on merits of the Enclosure

A 4. It is submitted that the Learned Registrar had erred in dismissing the JD's application in Enclosure 4 based on grounds not argued before him. Having heard the PO the Registrar ought to have rule on the PO instead of addressing matters yet to be argued.

B **[19]** However, the learned High Court Judge, with respect, in her judgment did not address the complaint and only proceeded to hear the merits of the setting aside application.

[20] The appeal before us is by the judgment debtor against the C decision of the learned judge dated 4 February 2013.

[21] Before us, learned counsel for the judgment debtor raised two main grounds for appeal, namely, (1) that the decision of the learned Deputy Registrar was seriously flawed by reason of a D breach of the rules of natural justice for failing to hear the application on merits before making his decision and that the learned High Court Judge should have addressed and ruled on this issue instead of glossing over it; and (2) that the second bankruptcy notice filed by the judgment creditor amounted to an E abuse of process of the court since the judgment creditor had earlier made a decision not to proceed with the first bankruptcy proceedings.

[22] Learned counsel for the judgment debtor argued before us that on 24 October 2012, the learned Deputy Registrar was only F scheduled to deliver his decision on the preliminary objection raised by the judgment creditor, as the learned Deputy Registrar had only heard arguments on the preliminary objection. Instead, the learned Deputy Registrar decided not only on the preliminary objection but also on the summons in chambers (encl. 4) on the G setting aside of the second bankruptcy notice. This was done despite the fact that parties had not submitted before the learned Deputy Registrar on the application for setting aside the second bankruptcy notice. In short, the judgment debtor's complaint is that he was not accorded the right to be heard on the application H to set aside the second bankruptcy notice.

[23] In deciding on the application to set aside the second bankruptcy notice without according the parties an opportunity to argue on its merits, the judgment debtor contends that the learned I Deputy Registrar had acted in breach of rules of natural justice and as such the decision by the learned Deputy Registrar on the application to set aside the bankruptcy notice is a nullity and is liable to be set aside.

[24] Learned counsel for the judgment creditor on the other hand contended that the judgment debtor's right to be heard has not been breached, for the judgment debtor had filed two written submissions before the learned Deputy Registrar on the application to set aside the second bankruptcy notice. That being the case, the judgment debtor is deemed to have argued his case before the learned Deputy Registrar.

[25] Further, it is the contention of the judgment creditor that even if the judgment debtor was not accorded the right to ventilate his arguments before the learned Deputy Registrar, this omission or denial was cured by the fact that the judgment debtor had argued on the merits of the application before the learned judge on appeal.

[26] Since an appeal before the judge is by way of a re-hearing, the judgment debtor had been accorded ample opportunity to submit. That being the case, there has not been a breach of rules of natural justice in the hearing of the application of the judgment debtor to set aside the second bankruptcy notice.

[27] With due respect, we are unable to agree with the submission of the learned counsel for the judgment creditor. We find that the failure on the part of the learned Deputy Registrar to accord parties the right to be heard before him amounts to a fundamental breach of rules of natural justice. The hearing of the application to set aside the second bankruptcy notice before the learned Deputy Registrar is procedurally flawed as the learned Deputy Registrar should have allowed learned counsel for the judgment debtor to submit orally, despite the fact that parties had filed their written submissions. It is the rule of law that parties in a court proceedings have the right to be heard before a deliberation is made.

[28] We are of the opinion that even when written submissions have been filed, the judgment debtor still has a right to be heard orally. This is a fundamental right of the rule of law and cannot be denied to the judgment debtor. The learned Deputy Registrar had failed to allow the judgment debtor the right to submit orally despite the fact that the judgment debtor had written two letters to the High Court seeking an oral hearing before the setting aside application was decided. However, it is sad to note that the learned Deputy Registrar failed to respond to any of the said two

letters. Instead, without hearing arguments by either party, the learned Deputy Registrar proceeded to deliver his decision on the application to set aside the second bankruptcy notice. The learned Deputy Registrar's action amounts to a gross procedural impropriety and a blatant disregard of the rules.

[29] Moreover, we find that since the learned Deputy Registrar had reserved 24 October 2012 for decision on the preliminary issue only, the learned Deputy Registrar should have confined his decision on the preliminary issue only. In deciding on the application to set aside the second bankruptcy notice without hearing the merits of the application, the learned Deputy Registrar had committed a serious miscarriage of justice. In this respect, we refer to the Federal Court decision of *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors and Another Application* [2010] 3 CLJ 895, in which Gopal Sri Ram FCJ held (at p. 901 of the judgment):

> According to the applicants, the Court of Appeal dismissed this appeal without hearing argument on it. This, at first blush, is a serious complaint. It is contrary to procedural fairness for a court to adjudge an appeal against the appellant without hearing arguments.

[30] Guided by the above passage of the judgment, we therefore find the decision of the learned Deputy Registrar on the application to set aside the second bankruptcy notice as procedurally flawed and must be set aside.

[31] We also wish to add that, with due respect, we are unable to agree with the argument by the learned counsel for the judgment creditor that the failure of the learned Deputy Registrar to accord an oral hearing to the judgment debtor is curable as the appeal before the judge is by way of a re-hearing. Whilst we agree that the appeal before the judge is by way of a re-hearing, it does not mean that there need not be a hearing before the learned Deputy Registrar. To deny the parties the right to argue before the learned Deputy Registrar would in essence mean that the parties would be deprived of one level of hearing before the court. Such a practice is procedurally flawed and cannot be condoned by this court.

[32] In our judgment, the learned High Court Judge erred in law in ignoring the complaint of the learned counsel for the judgment debtor that the parties before the Deputy Registrar were denied

the right to make oral submissions on the merits of the setting aside application. The learned High Court Judge should have entertained the complaint, and should have ordered that the matter be sent back to the Deputy Registrar for oral submission on the merits. Since the matter began at the Deputy Registrar's level, the judgment debtor was entitled to a full and proper hearing before the Deputy Registrar. Such a right should not have been denied.

[33] The second issue raised by the learned counsel for the judgment debtor before us is that the judgment creditor had abused the process of the court by re-initiating bankruptcy proceedings against the judgment debtor after having discontinued the same in compliance with the instruction from the Permanent Secretary of the Ministry of Finance, Sabah.

[34] Learned counsel for the judgment creditor, however, argued that since there was a valid judgment against the judgment debtor, and since the judgment remained unsatisfied, the judgment creditor was entitled to continue bankruptcy proceedings against the judgment debtor. It was further argued by counsel for the judgment creditor that the letter by the Permanent Secretary of the Ministry of Finance, Sabah, was merely a request and cannot be considered as an instruction from the State Government of Sabah.

[35] With due respect, we are unable to agree with learned counsel for the judgment creditor. On the facts, it is clear that after the letter by the Permanent Secretary of the Ministry of Finance, Sabah, on 10 November 2008, the judgment creditor had instructed that the first bankruptcy proceedings be discontinued and the judgment creditor had duly complied with the State Government's instruction. Thereafter, for almost three and a half years, the judgment creditor did not initiate any further bankruptcy proceedings against the judgment debtor.

[36] In our judgment, the conduct of the judgment creditor in not proceeding with the bankruptcy matter against the judgment debtor in compliance with the instruction from the Permanent Secretary is a clear indication by the judgment creditor that it had put a finality to the bankruptcy proceedings against the judgment debtor and this means that the judgment debtor is now entitled to conduct his personal affairs accordingly, without having to worry of the threat of the bankruptcy proceedings.

[37] In our judgment, in the light of these facts, the conduct of the judgment creditor in initiating a fresh bankruptcy proceedings against the judgment debtor based on the very same judgment of 28 August 2006, some three and a half years later, amounts to an abuse of process of the court. In this regard, we refer to the *dictum* of Lord Bingham of Cornhill in the House of Lords case of *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529 where it was said:

> But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not twice be vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.

[38] Further, in *Bradford & Bingley Building Society v. Seddon* [1999] 1 WLR 1482, Auld LJ held (at p. 1490):

> In my judgment, it is important to distinguish clearly between *res judicata* and abuse of process not qualifying as *res judicata* … The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in 'special cases' or 'special circumstances' … The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter.

[39] Based on the reasons above, we therefore allow the appeal with costs of RM10,000 in favour of the judgment debtor for the court here and below.

Appeal is allowed with costs.